

## Title 50—Wildlife and Fisheries

## CHAPTER I—UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

## SUBCHAPTER B—TAKING, POSSESSION, TRANSPORTATION, SALE, BARTER, PURCHASE, EXPORTATION, AND IMPORTATION OF WILDLIFE AND PLANTS

## PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

## Final Threatened Status and Critical Habitat for Five Species of Southeastern Fishes

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rulemaking.

SUMMARY: The Service determines the following five species of fishes to be Threatened species and determines their Critical Habitat: Alabama cavefish (*Speoplatyrhinus poulsoni*), slender chub (*Hybopsis caini*), spotfin chub (*Hybopsis monacha*), slackwater darter (*Etheostoma boschungii*), yellowfin madtom (*Noturus flavipinnis*). This action is being taken because of the threatened adverse modification of their habitat. In the past, destruction of habitat has greatly reduced populations of these species.

DATES: This final rulemaking becomes effective on October 11, 1977.

## FOR FURTHER INFORMATION CONTACT:

Mr. Keith M. Schreiner, Associate Director—Federal Assistance, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240 (202-343-4646).

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

On January 12, 1977, the Service published a proposed rulemaking in the *FEDERAL REGISTER* (42 FR 2507-2515) advising that sufficient evidence was on file to support a determination that the Alabama cavefish, slender chub, spotfin chub, slackwater darter, and yellowfin madtom were Threatened species as provided for by the Act. That proposal summarized the factors thought to be contributing to the likelihood that these fishes could become Endangered within the foreseeable future; specified the prohibitions which would be applicable if such a determination were made; and solicited comments, suggestions, objections, and factual information from any interested person. Section 4(b)(1)(A) of the Act requires that the Governor of each State, within which a resident species of wildlife is known to occur, be notified and be provided 90 days to comment before any such species is determined to be a Threatened species or an Endangered species. A letter was sent to the Governors of the States of Alabama, North Carolina, Tennessee, and Virginia, notifying them of the proposed rulemaking for the Alabama cavefish, slender chub, spotfin chub, slackwater darter, and yellowfin madtom. A similar letter was sent to the State Conservation De-

partment of the States involved. A memorandum was sent to the Service Directorate and affected Regional personnel, and other interested parties were contacted regarding this proposal.

## SUMMARY OF COMMENTS AND RECOMMENDATIONS

Section 4(b)(1)(C) of the Act requires that a summary of all comments and recommendations received be published in the *FEDERAL REGISTER* prior to adding any species to the List of Endangered and Threatened Wildlife.

In the January 12, 1977, *FEDERAL REGISTER* proposed rulemaking (42 FR 2507-2515) and the associated January 16, 1977, News Release, all interested parties were invited to submit factual reports or information which might contribute to the formulation of a final rulemaking.

Letters were received from 3 Federal agencies, the U.S. Forest Service, U.S. Soil Conservation Service, and the TVA. Four States, Alabama, North Carolina, Tennessee, and Virginia, submitted responses to the proposal. Comments were also received from the American Society of Ichthyologists and Herpetologists, the Sierra Club and two individuals.

The U.S. Soil Conservation Service raised questions regarding the total distribution of the slackwater darter in the southern bend of the Tennessee River system in Alabama and Tennessee. They suggested it might have a wider distribution but offered no supporting distributional data. They also suggested excluding all or portions of five streams in the Cypress Creek system as Critical Habitat. We agree, in part, and have so altered the Critical Habitat delineations to reflect these changes.

The U.S. Forest Service had no objection to the proposal. They did suggest that we contact Dr. H. T. Boschung for his input. The Fish and Wildlife Service did contact Dr. Boschung and obtained his data and recommendations.

The TVA had no objection to the proposed Threatened status for the five fishes. They did not feel that there was sufficient data to support Critical Habitat delineation for the fishes, except the Alabama cavefish.

The response from the Governor of Alabama indicated that he was basically in agreement with the proposal. The fisheries staff of the State of Alabama and the specialists they consulted were also in agreement with the proposal. They did indicate that the spotfin chub (*Hybopsis monacha*) had been extirpated in Alabama. They also submitted the results of a recent statewide symposium on Endangered and Threatened Plants and Animals of Alabama which referred to the Alabama cavefish (*Speoplatyrhinus poulsoni*) as an Endangered species. After considering all data, we do not feel that the degree of threat for the Alabama cavefish is sufficient to warrant an Endangered classification.

The State of North Carolina comments were restricted to the spotfin chub (*Hybopsis monacha*) Critical Habitat designation in Macon County, N.C. They were

interested in obtaining more information about the specific habitat requirements of the spotfin chub in order to more adequately evaluate the impacts of a possible development of a small flood control project. This information will be forwarded to the State of North Carolina.

Response from the State of Tennessee Wildlife Resources Agency indicates they are in basic agreement with the proposed Threatened classification and Critical Habitat determination for the four species of fishes occurring in their State. The Tennessee Department of Public Health submitted comments relative to the existing industry and domestic discharges emptying into the Powell and Clinch River.

The Governor of Virginia responded and had no objection to the proposed Threatened status and Critical Habitat determination for the three fishes occurring in the State of Virginia.

Two organizations, the American Society of Ichthyologists and Herpetologists and the Sierra Club supported the proposed listing and the Critical Habitat determination.

Two professional ichthyologists responded and both concur with findings presented in the proposal.

## CONCLUSION

After a thorough review and consideration of all the information available, the Director has determined that the Alabama cavefish, slender chub, spotfin chub, slackwater darter, and yellowfin madtom are likely to become Endangered throughout all or a significant portion of their range due to one or more of the factors described in Section 4(b) of the Act. This review amplifies and substantiates the description of the factors included in the proposed rulemaking (42 FR 2507-2515). Those factors were described as follows:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range:

The geographic range of the slackwater darter, *Etheostoma boschungii*, Proposed Threatened—is four tributaries to the southern bend of the Tennessee River in northern Alabama and southeastern Tennessee. It is known from one locality in the headwaters of the Buffalo River in Lawrence County, Tennessee; 19 localities in Cypress Creek drainage in Wayne County, Tennessee, and Lauderdale County, Alabama; three localities in Swan Creek in Limestone County, Alabama; and three localities in the Flint River drainage in Madison County, Alabama. Intensive collecting in adjacent drainages has failed to demonstrate the presence of the slackwater darter. The habitat of *Etheostoma boschungii* is small to medium-sized streams with moderate to slow current. It seems to prefer bottom conditions characterized by an accumulation of leaves and detritus, but in some areas it has been found in association with clean silt, sand, and small gravel substrates.

Over the past five years periodic sampling of the slackwater darter in the headwaters of the Buffalo River in La-

rence County, Tennessee, has indicated that its population is extremely small and limited. In this area the species is confined to a short segment of a very small stream and the number of individuals in this population is apparently quite low. The population of *Etheostoma boschungii* in the Flint River drainage in Madison County, Alabama, is similarly small and limited. Changing land use patterns associated with the growth of the city of Huntsville, Alabama, jeopardizes the survival of the population in this system. The Swan Creek population is threatened by a stream channelization project.

Of the four stream systems inhabited by the slackwater darter the largest population and the stronghold of the species is in the Cypress Creek drainage system. As presently planned the proposed Soil Conservation Service project for the Cypress Creek Watershed will adversely affect the species. The project will result in the destruction of habitat through the construction of headwater impoundments, new channel excavations, bedload removal and other stream alterations.

Slender chub, *Hybopsis cahini*—Proposed Threatened—is restricted to the Clinch and Powell Rivers in Tennessee above Norris Reservoir and is threatened by the coal industry effluents which are on the increase, municipal wastes and the continuing risk of chemical spillage including fly ash and sulfuric acid. A coal output of 30,000,000 tons is projected for this area by the year 2000. Many of the 24 authorized sewage dischargers are overloaded and not capable of producing an acceptable effluent under current water quality standards. Gravel removed from sand and gravel bars in the river channel and the resulting siltation is a threat at one locality.

Spotfin chub, *Hybopsis monacha*—Proposed Threatened—is restricted to the Tennessee River drainage where it once occurred widely in twelve tributary systems distributed among five States, but is today known only from the lower North Fork of the Holston River, Virginia and Tennessee; in the Emory River, Clear Creek tributary of the Emory River System, Tennessee; and the upper Little Tennessee River, North Carolina. Only in the Emory River system is this species still abundant, although it appears to be recovering in the Little Tennessee River in North Carolina.

Threats to this species include runoff from coal mining, operations, municipal and industrial wastes, and siltation.

Yellowfin madtom, *Noturus flavipinnis*—Proposed Threatened—is restricted to the Powell River in Tennessee, and Copper Creek tributary to the Clinch River in Virginia. It was formerly known from Chikamauga Creek in Georgia, Hines Creek in Tennessee and the North Fork of the Holston River in Virginia. It is threatened by coal mining and coal washing in the Powell River, siltation and enrichment from agricultural operations in Copper Creek. The risk of chemical spillage where the rivers are crossed by major roads, is a potential threat.

Alabama cave fish, *Speoplatyrhinus poulsoni*—Proposed Threatened—is a blind, white, troglolitic cave fish known only from a cave in Lauderdale County, Alabama. It may occur in other subterranean waters of the area, but is, definitely absent from nearby caves and other caves which were inundated by Pickwick Lake. It is threatened by disruption of the ecosystem through interference with bat populations and ground-water pesticide pollution due to agricultural operations. A proposed industrial park in this area constitutes an additional threat. Few eggs are produced per female and reproduction does not occur every year.

(2) Overutilization for commercial, sporting, scientific, or educational purposes. Not applicable.

(3) Disease or predation. Not applicable.

(4) The inadequacy of existing regulatory mechanisms. Not applicable.

(5) Other natural or man-made factors affecting its continued existence. Not applicable.

#### CRITICAL HABITAT

The Director has considered all comments and data submitted in response to the proposed determination of Critical Habitat for the slender chub, spotfin chub, slackwater darter, yellowfin madtom, and Alabama cavefish (42 FR 2507-2515). Based on this review, Critical Habitat for the slackwater darter has been reduced in the Cypress Creek system and eliminated in the Flint River system until additional data is obtained. This reduction in area is based on data presented by the biologists from the States of Alabama and Tennessee, the TVA, Fish and Wildlife Service, and ichthyologists from four colleges and universities in the State of Alabama.

#### EFFECT OF THE RULEMAKING

The effects of these determinations and this rulemaking include, but are not necessarily limited to, those discussed below.

Endangered species regulations already published in Title 50 of the Code of Federal Regulations set forth a series of general prohibitions and exceptions which apply to all Endangered and Threatened species. The regulations referred to above, which pertain to Endangered and Threatened species, are found in §§ 17.21 and 17.31 of Title 50 and are reprinted below:

#### Subpart C—Endangered Wildlife

##### § 17.21 Prohibitions.

(a) Except as provided in Subpart A of this part, or under permits issued pursuant to § 17.22 or § 17.23, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit or to cause to be committed, any of the acts described in paragraphs (b) through (f) of this section in regard to any endangered wildlife.

(b) *Import or export.* It is unlawful to import or to export any endangered wildlife. Any shipment in transit through the United States is an importation and

an exportation, whether or not it has entered the country for customs purposes.

(c) *Take.* (1) It is unlawful to take endangered wildlife within the United States, within the territorial sea of the United States, or upon the high seas. The high seas shall be all waters seaward of the territorial sea of the United States, except waters officially recognized by the United States as the territorial sea of another country, under international law.

(2) Notwithstanding paragraph (c) (1) of this section, any person may take endangered wildlife in defense of his own life or the lives of others.

(3) Notwithstanding paragraph (c) (1) of this section, any employee or agent of the Service, any other Federal land management agency, the National Marine Fisheries Service, or a State conservation agency, who is designated by his agency for such purposes, may, when acting in the course of his official duties, take endangered wildlife without a permit if such action is necessary to:

(i) Aid a sick, injured or orphaned specimen; or

(ii) Dispose of a dead specimen; or

(iii) Salvage a dead specimen which may be useful for scientific study; or

(iv) Remove specimens which constitute a demonstrable but nonimmediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in a remote area.

(4) Any taking pursuant to paragraphs (c) (2) and (3) of this section must be reported in writing to the United States Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 19183, Washington, D.C. 20036, within 5 days. The specimen may only be retained, disposed of, or salvaged in accordance with directions from Service.

(5) Notwithstanding paragraph (c) (1) of this section, any qualified employee or agent of a State Conservation Agency which is a party to a Cooperative Agreement with the Service in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may, when acting in the course of his official duties take Endangered Species, for conservation programs in accordance with the Cooperative Agreement, provided that such taking is not reasonably anticipated to result in: (i) the death or permanent disabling of the specimen; (ii) the removal of the specimen from the State where the taking occurred; (iii) the introduction of the specimen so taken, or of any progeny derived from such a specimen, into an area beyond the historical range of the species; or (iv) the holding of the specimen in captivity for a period of more than 45 consecutive days.

(d) *Possession and other acts with unlawfully taken wildlife.* (1) It is unlawful to possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any endangered wildlife which was

taken in violation of paragraph (c) of this section.

*Example.* A person captures a whooping crane in Texas and gives it to a second person, who puts it in a closed van and drives thirty miles, to another location in Texas. The second person then gives the whooping crane to a third person, who is apprehended with the bird in his possession. All three have violated the law—the first by illegally taking the whooping crane; the second by transporting an illegally taken whooping crane; and the third by possessing an illegally taken whooping crane.

(2) Notwithstanding paragraph (d) (1) of this section, Federal and State law enforcement officers may possess, deliver, carry, transport or ship any endangered wildlife taken in violation of the Act as necessary in performing their official duties.

(e) *Interstate or foreign commerce.* It is unlawful to deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, any endangered wildlife.

(f) *Sale or offer for sale.* (1) It is unlawful to sell or to offer for sale in interstate or foreign commerce any endangered wildlife.

(2) An advertisement for the sale of endangered wildlife which carries a warning to the effect that no sale may be consummated until a permit has been obtained from the U.S. Fish and Wildlife Service shall not be considered an offer for sale within the meaning of this subsection.

#### Subpart D—Threatened Wildlife

##### § 17.31 Prohibitions.

(a) Except as provided in Subpart A of this Part, or in a permit issued under this Subpart, all of the provisions in § 17.21 (a) through (c) (4) shall apply to threatened wildlife.

(b) In addition to any other provisions of this Part 17, any employee or agent of the Service, of the National Marine Fisheries Service, or of a State conservation agency which is operating a conservation program pursuant to the terms of a Cooperative Agreement with the Service in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may, when acting in the course of his official duties, take any threatened wildlife to carry out scientific research or conservation programs.

(c) Whenever a special rule in §§ 17.40 to 17.48 applies to a threatened species, none of the provisions of paragraphs (a) and (b) of this section will apply. The special rule will contain all the applicable prohibitions and exceptions.

The determination set forth in this final rulemaking also makes the Alabama cavefish, slender chub, spotfin chub, slackwater darter and yellowfin madtom eligible for the consideration provided by Section 7 of the Act. That Section reads as follows:

#### INTERAGENCY COOPERATION

Section 7. The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of the Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

The Director has prepared, in consultation with an ad hoc interagency committee, guidelines for Federal agencies for the application of Section 7 of the Act. In addition, proposed provisions for interagency cooperation were published on January 26, 1977, in the FEDERAL REGISTER (42 FR 4868-4875) to assist Federal agencies in complying with Section 7. Regulations which appear in Part 17, Title 50 of the Code of Federal Regulations were first published in the FEDERAL REGISTER of September 26, 1975 (40 FR 44412), and provide for the issuance of permits to carry out otherwise prohibited activities involving Endangered or Threatened species under certain circumstances.

#### EFFECT INTERNATIONALLY

In addition to the protection provided by the Act, the Service will review the Alabama cavefish, slender chub, spotfin chub, slackwater darter, and yellowfin madtom to determine whether they should be proposed to the Secretariat of the Convention on Interna-

tional Trade in Endangered Species Wild Fauna and Flora for placement upon the appropriate Appendix (ices) that Convention or whether they should be considered under other, appropriate international agreements.

#### NATIONAL ENVIRONMENTAL POLICY ACT

An Environmental Assessment has been prepared and is on file in the Service's Washington Office of Endangered Species. It addresses this action as it involves the Alabama cavefish, slender chub, spotfin chub, slackwater darter and yellowfin madtom. The assessment is the basis for a decision that this determination is not a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969.

This rulemaking is issued under the authority contained in the Endangered Species Act of 1973 (U.S.C. 1531-1541, 87 Stat. 884), and was prepared by I. James D. Williams, Office of Endangered Species, 202-343-7814.

NOTE.—The Department of the Interior has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11949 and OMB Circular 107.

Dated: September 1, 1977.

LYNN A. GREENWALD,  
Director,  
Fish and Wildlife Service.

Accordingly, Part 17 of Chapter 1, Title 50 of the U.S. Code of Federal Regulations is amended as follows:

1. Add the Alabama cavefish, slender chub, spotfin chub, slackwater darter and yellowfin madtom to the list in § 17.11 under "fishes" as indicated below:

Species			Range		Status	When listed	Special rule
Common name	Scientific name	Population	Known distribution	Portion of range where threatened or endangered			
Fishes:							
Cavefish, Alabama	<i>Speoplatyrhinus poulsoni</i>	N/A	United States (Alabama).	Entire.....	T	28	N/A
Chub, slender.....	<i>Hybopsis cahnii</i> .....	N/A	United States (Tennessee, Virginia).	.....do.....	T	28	17.44(c)
Chub, spotfin.....	<i>Hybopsis monacha</i> .....	N/A	United States (Virginia, Tennessee, North Carolina).	.....do.....	T	28	17.44(c)
Darter, slackwater.	<i>Etheostoma boschungii</i> .	N/A	United States (Alabama, Tennessee).	.....do.....	T	28	17.44(c)
Madtom, yellowfin.	<i>Noturus flavipinnis</i> .	N/A	United States (Tennessee, Virginia).	.....do.....	T	28	17.44(c)

2. Add a new paragraph (c) to § 17.44 as follows:

(c) Slender chub (*Hybopsis cahnii*), spotfin chub (*Hybopsis monacha*), slackwater darter (*Etheostoma boschungii*), and yellowfin madtom (*Noturus flavipinnis*).

(1) All the provisions of § 17.31 apply to these species, except that they may be taken in accordance with applicable State law.

(2) Any violation of State law will also be a violation of the Act.

#### Subpart I—Interagency Cooperation

§§ 17.90-17.94 [Reserved]

§ 17.95 Critical habitat—fish and wildlife.

The following areas (exclusive of the existing man-made structures or settle-

ments which are not necessary to the normal needs or survival of the species) are Critical Habitat for the species indicated. Pursuant to Section 7 of the Act, all Federal agencies must insure that actions authorized, funded, or carried out by them do not result in the destruction or adverse modification of these areas:

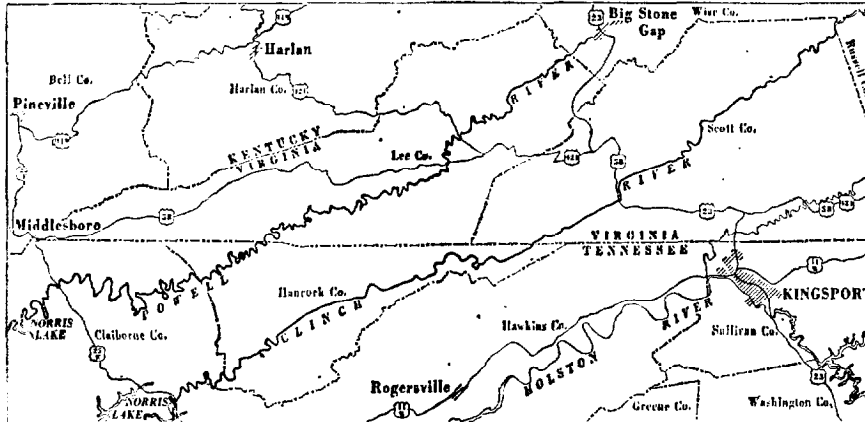
(e) Fishes.

**Slender Chub (*Hybopsis caini*).**  
Tennessee. Claiborne and Hancock Counties. Powell River, main channel from backwaters of Norris Lake upstream to the Tennessee-Virginia State line. Clinch River, main channel from backwaters of Norris Lake upstream to the Tennessee-Virginia State line.  
Virginia. Lee and Scott Counties. Powell River, main channel from the Tennessee-Virginia State line upstream through Lee County, Va. Clinch River, main channel from the Tennessee-Virginia State line upstream through Scott County, Va.

**Slackwater Darter (*Etheostoma boschungii*).**

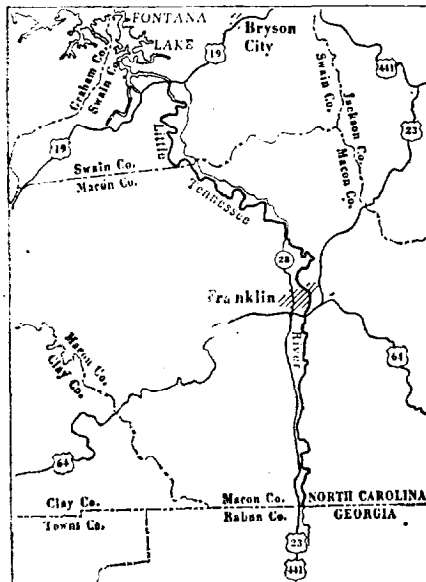
Alabama. Lauderdale County. All permanent and intermittent streams with flowing water from December to June tributary to Cypress Creek and its tributaries upstream from the junction of Burcham Creek, including Burcham Creek, excluding Threet Creek and its tributaries.

Tennessee. Wayne County. All permanent and intermittent streams with flowing water from December to June tributary to Cypress and Middle Cypress Creek drainage.



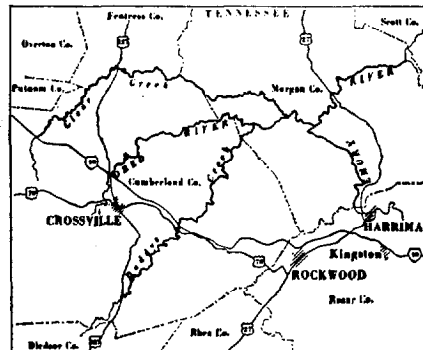
CRITICAL HABITAT FOR THE SLENDER CHUB

**Spotfin Chub (*Hybopsis monacha*).**  
North Carolina. Macon and Swain Counties. Little Tennessee River, main channel from the backwaters of Fontana Lake upstream to the North Carolina-Georgia State line.



CRITICAL HABITAT FOR THE SPOTFIN CHUB

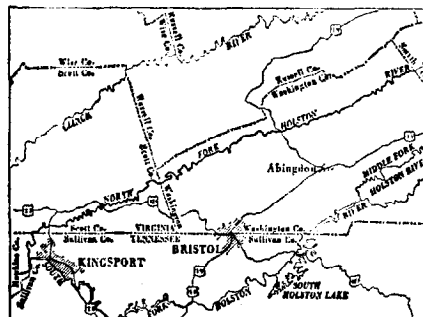
Tennessee. Cumberland, Fentress, and Morgan Counties. Emory and Obed Rivers and Clear and Daddys Creek in Morgan County. Clear Creek in Fentress County. Obed River upstream to U.S. Interstate Highway 40, Clear Creek upstream to U.S. Interstate Highway 40 and Daddys Creek upstream to U.S. Highway 127 in Cumberland County.



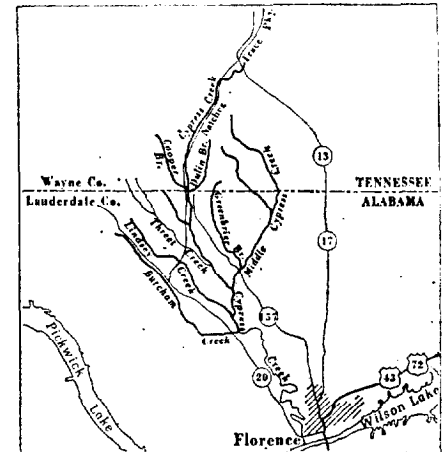
CRITICAL HABITAT FOR THE SPOTFIN CHUB

Tennessee. Hawkins and Sullivan Counties. North Fork Holston, main channel upstream from junction with South Fork Holston River to the Tennessee-Virginia State line.

Virginia. Scott and Washington Counties. North Fork Holston River, main channel from the Virginia-Tennessee State line upstream through Scott and Washington Counties.

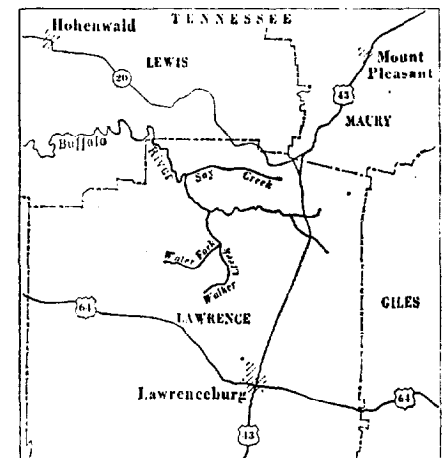


CRITICAL HABITAT FOR THE SPOTFIN CHUB



CRITICAL HABITAT FOR THE SLACKWATER DARTER

Tennessee. Lawrence County. Buffalo River and its tributaries in Lawrence County, Tenn.



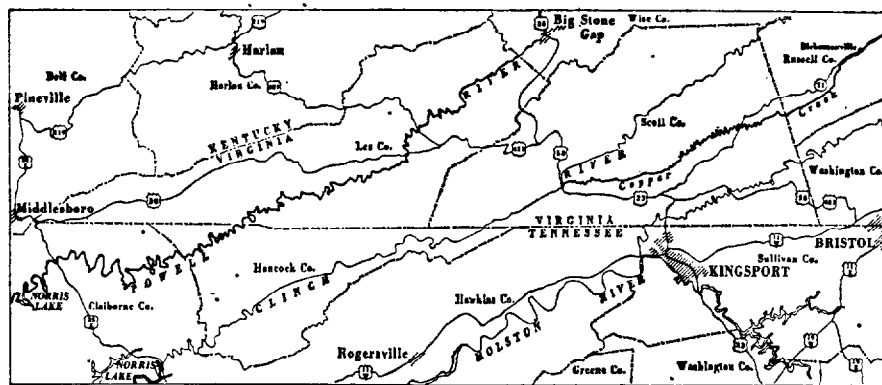
CRITICAL HABITAT FOR THE SLACKWATER DARTER

**Yellowfin Madtom (*Noturus flavipinnis*).**

Tennessee. Claiborne and Hancock Counties. Powell River, main channel from backwaters of Norris Lake upstream to the Tennessee-Virginia State line.

Virginia. Lee, Scott, and Russell Counties. Powell River, main channel from the Virginia-Tennessee State line upstream through Lee County. Copper Creek, main channel from its junction with Clinch River upstream through Scott County and upstream in Russell County to Dickensonville.

## RULES AND REGULATIONS



CRITICAL HABITAT FOR THE YELLOWFIN MADTOM

Alabama Cavefish (*Speoplatyrhinus poulseni*).

Alabama. Lauderdale County. More specific locality data for Federal agencies fulfilling their obligations under Section 7 of the En-

dangered Species Act of 1973 can be obtained from the Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240.

[FR Doc.77-26182 Filed 9-8-77; 8:45 am]